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In the

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1029

SAMUEL A. SCARNATO, ET AL.,
Plaintiff-Appellants,

v.

HONORABLE MRS. MARY EVELYN PARKER
TREASURER OF THE STATE OF LOUISIANA, ET AL.,
Defendant-Appellees,
LOUISIANA SCHOOL BOARDS ASSOCIATION AND
JEFFERSON PARISH SCHOOL BOARD,
Intervenor-Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

DEFENDANT-APPELLEES AND LOUISIANA SCHOOL BOARDS ASSOCIATION MOVE THE COURT TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED ON THE APPEAL ON THE GROUND THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT. IN THE ALTERNATIVE, DEFENDANT-APPELLEES AND LOUISIANA SCHOOL BOARDS ASSOCIATION MOVE THE COURT TO DISMISS THE APPEAL HEREIN ON THE GROUNDS HEREINAFTER SET FORTH IN SUPPORT THEREOF.

I. MOTION TO AFFIRM

Defendant-appellees and Intervenor-appellee, Louisiana School Boards Association, pursuant to Rule 16 (1) (c) and (d) of the Rules of the Supreme Court of the United States, move that the final judgment and order of the District Court be affirmed on the ground that the decision of the District Court is so obviously correct under the principles of federal comity and the principles established by this Court in *San Antonio Independent School District v. Rodriquez*, 411 U. S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *McInnis v. Shapiro*, 293 F.Supp. 327 (Ill., 1968) affirmed sub nom. *McInnis v. Ogilvie*, 394 U. S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969); and *Burruss v. Wilkerson*, 310 F.Supp. 572 (Va., 1969) affirmed 397 U. S. 44, 90 S.Ct. 812, 25 L.Ed.2d 37 (1970), as to warrant no further review by this Court.

A. Opinion Below

The judgment and Per Curiam opinion of the District Court are set forth in Appendix A of plaintiff-appellants' jurisdictional statement and reported at 415 F.Supp. 272 (M.D. La., 1976). The Court's minute entry denying plaintiff-appellants' motion for a new trial is set forth in Appendix B of plaintiff-appellants' jurisdictional statement.

B. Jurisdiction

Subject to Louisiana School Boards Association's and defendant-appellees' alternative Motion to Dismiss, especially, but not exclusively, on the ground of lack of

jurisdiction, the jurisdictional requisites are adequately set forth in plaintiff-appellants' jurisdictional statement.

C. Question Presented

Immediately, defendant-appellees and Louisiana School Boards Association take issue with the question presented in plaintiff-appellants' jurisdictional statement. The true question presented is as follows: Whether, during an interim period of some three years during which the state is actually moving in deliberate steps from unequal assessment as to only immovable property under an "actual cash value" system of ad valorem assessment to equal assessment under a percentage of fair market value system, the Fourteenth Amendment to the U. S. Constitution requires the state legislature, in approving and thereby making efficacious and in appropriating state funds in connection with an annual state minimum foundation program of education formula wherein the state merely insures, as a secondary obligor, the program support in each local school district only to the extent that local ability to pay therefor falls short of fully supporting the program therein, to abandon, in determining such local ability to pay support for such educational program, the use of real, actual amounts of local funds derived from a tax of a fixed millage on all property—both movable and immovable—within each local school district and to utilize, in lieu of these real, actual amounts of local funds, inexact hypothetical, theoretical amounts of "local property tax funds" not actually collected and available to pay for such educational program support.

D. Constitutional and Statutory Provisions Involved

Pertinent constitutional and statutory provisions are set forth in plaintiff-appellants' jurisdictional statement.

E. Statement

In this case on appeal, state fiscal policy is of a minor significance, if it is of any significance at all. The focal point of the state's legitimate interest being furthered by the formula assailed by plaintiff-appellants in this case is the state's educational policy, particularly by the state's interest in insuring a minimum foundation program of education. This legitimate interest or goal of the state is similar to that of Texas in the *Rodriquez* case, supra, and is wholly unrelated to the apparent state goal or interest of the Property Tax Relief (PTR) fund involved in *Levy v. Parker*, 346 F.Supp. 897 (E.D. La., 1972) affirmed 411 U. S. 978, 93 S.Ct. 2266, 36 L.Ed.2d 955 (1973). Because the state goal or interest being furthered herein is wholly different from and unrelated to the state goal or interest apparently involved in *Levy v. Parker*, supra, what may be a rational means of furthering the state goal or interest in this case on appeal necessarily differs wholly from and is quite unrelated to what may or may not be a rational means of furthering the other state goal or interest involved in the *Levy* case, supra. Where the ends are totally unrelated, the means reasonable to achieve those different ends bear no correlation to one another. The legitimate state interest in this case is the insuring of a minimum foundation program of education for all public elementary and secondary schools in the state.

As pointed out in *Rodriquez*, supra, this "foundation grant" theory is a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig, and in the program's reliance on both state and local resources, Louisiana's minimum foundation program of education is comparable to the programs that have been employed in virtually every other state. As also explained in *Rodriquez*, the minimum foundation program of education is designed to accomplish many varied educational goals. It tends to have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Local school board contribution to the support of the program assures local autonomy and local control of local schools. The local school board contribution to the support of the program is low enough not to exhaust the revenues of local school boards, which may use other local revenue sources to enrich the local educational offering to a level above the minimum level guaranteed or insured by the state minimum foundation program of education. The state funds are not appropriated to support entirely but rather merely to guarantee or insure the program; in Louisiana, Article VIII, Section 13(B), of the 1974 Louisiana Constitution expressly states that the state funds appropriated are merely "to insure" the minimum foundation program of education. "To insure" this program means to pay, as a secondary obligor only, the losses incurred by the lack of amounts of local school board contribution, paid as the primary support obligation, to fully fund and support the program throughout the local

districts. In other words, state funds insure or guarantee the minimum foundation program of education in every local school district only to the extent that the local school board support contribution falls short of fully funding and supporting the total costs of this program within the local school district. In all these respects, the Louisiana minimum foundation program of education is similar to that of Texas in the *Rodriquez* case, supra.

The precise minimum level of educational operation guaranteed by the program is defined on a yearly basis and may change from year to year. The local school board primary support contribution is also defined on a yearly basis. The state fund amounts vary directly with respect to the level of minimum education defined in any given year and inversely with respect to the local school board primary support contribution. In the program's overall history, both the minimum level offered and the amount of state fund contribution have risen markedly.

In defining the minimum level of education offered by the program, Louisiana is very similar to Texas in the *Rodriquez* case; the program assures that there will be teachers, compensated at the state teacher salary schedule, in certain fixed teacher-pupil ratios in every public elementary and secondary school in the state, special education teachers, principals, and other supportive personnel according to schedules which are uniformly applied to every public elementary and secondary school in the state, and payment of transportation and other operating costs according to uniformly applied schedules.

Although the local school board primary support contribution varies from year to year and has paid a lower ratio of the yearly program costs as the program has evolved over the years of its history, the state constitutionally authorized local school board property tax has always been a local revenue source included in determining local ability to contribute support to the program, because it is made effective by a mere resolution of the local school board, because its purpose is for general, basic educational needs (as is the minimum foundation program of education), and because it is the only local revenue source that is common to all local school boards in the state. In recent years the constitutionally authorized school board property tax for general, basic educational needs has been at the millage rate of five mills for all local school districts, except for plaintiff-appellants' Orleans Parish, which is authorized a millage rate of thirteen mills. Article VIII, Section 13(C), of the 1974 Louisiana Constitution also allows electors voting in a local school district to impose additional millages on themselves for "a specific purpose" (which has never been to render additional support to the minimum foundation program but rather other specific purposes). Such additional millages have not been included in determining local support in the minimum foundation program, because such use would be ultra vires to the specific purposes for which the electors of a local school district voted the additional millages on themselves, because the rationale of these additional millages is to have electors themselves increase their own tax burdens, but not that of others, for their own use and benefit in increasing the

educational levels in their own local school districts, and because using such additional millages to support the minimum level offering statewide would deter local electors from imposing extra tax burdens on themselves to raise the level of educational support and would deter experimentation and educational advancement as a whole.

Even though Orleans Parish is constitutionally authorized thirteen mills by mere resolution of the Orleans Parish School Board for general, basic educational needs (some eight mills higher than every other local school board in the state), Louisiana's 1975–1976 minimum foundation program formula used only the five mill property tax rate for local school support contribution from every local school board, including Orleans Parish School Board. Orleans Parish was allowed this extra eight mill rate of property tax (or better than some $10.4 million) to use strictly for its own benefit to add to and rise above the state guaranteed minimum level of education in Orleans Parish schools.

Another feature of the 1975–1976 program formula that resulted in additional sums of money for Orleans Parish was the computation of local ability to support the program as being the lower of either the actual collections from the five mill tax (after tax collector deductions for costs and commissions) or 90% of five mills times total parish assessment (effecting a presumed 10% cost of collecting the tax). But the Orleans Parish School Board received the full five mills times total parish assessment and, therefore, was able to lower its local support to the program by 10% of what it actually received

from the five mill tax, or something better than $650,000.

This feature allowing Orleans Parish to obtain this additional amount was deleted in the 1976–1977 program formula, which, at the same time, used a formula to approximate an equalization of assessments as to immovable property. There were also other changes in the definition of the minimum level of education that the program would guarantee in 1976–1977. All these changes were done together for a very specific purpose—to further the state's interest in avoiding drastic budget changes from one year to the next succeeding year in the local school districts throughout the state. Such drastic budget changes as plaintiff-appellants sought in 1975–1976 would disrupt education, destroy the minimum foundation program goals in that year, and bankrupt some 55 school boards in the state.

It is mandatory to understand that, under Louisiana law, neither the state department of education nor the local school boards exercise any influence over assessors' practices, over assessment, over the local boards of review, or over the state tax commission. There is one minor and insignificant exception: The president, and only the president, of the Orleans Parish School Board alone sits, with several other local New Orleans municipal officials, on the local Orleans Parish Board of Review. In effect, state and local governmental units supervising public education must take the assessments as they find them. Under Louisiana law, state and local governmental units supervising public education have no interest nor responsibility to oversee assessment prac-

tices; such interest and responsibility are delegated to the assessors, the state tax commission, the local boards of review, and ultimately the courts. Because the local boards of review are mostly comprised of the local governing authorities (usually the parish police jury or parish council, as the case may be), local school boards stand in a wholly different posture from the local governing authorities as to local assessment practices. Local governing authorities, which were the primary beneficiaries of the PTR fund in *Levy v. Parker*, supra, are implicated in assessment practices; local school boards are not.

Even though *Bussie v. Long*, 286 So.2d 689 (La. App. 1st Cir., 1973) did not hold that the state tax commission was required to equalize assessment ratios statewide, many people erroneously believed that that was the holding of the case. This Honorable Court should not concern itself with *Bussie v. Long*, supra, primarily for the following reasons: *Bussie v. Long* erroneously interpreted the equal protection clause of the Fourteenth Amendment to the U. S. Constitution as requiring much more than the equal treatment of all those similarly situated. Nevertheless, the court in *Bussie* had other state constitutional and statutory grounds to arrive at that same erroneous interpretation which the court applied to strike down the statutory definition of "actual cash value," to adopt, in lieu thereof, fair market value, and to strike down the statutory authority allowing local taxing districts to fix assessment valuations for taxes levied only within the local tax district and only for local tax district purposes, even though that

statutory authority also provided that such local tax district valuation operate equally and uniformly on all taxable property within the local district where the tax is being levied. *Bussie v. Long* then held that the state tax commission was required to supervise parish and Orleans assessors to assure that all taxable property to be assessed locally was assessed statewide at full fair market value, even though there were no longer any statewide property tax burdens. In any event, *Bussie v. Long* was overruled and superseded by the adoption of the 1974 Louisiana Constitution, the last word in Louisiana law on the subject of property tax assessments.

Basically, the 1974 Louisiana Constitution, in Article VII, Section 18, sets up a new property tax system with assessed value being at fixed percentages of fair market value (or use value for bona fide agricultural, horticultural, marsh, and timber lands). Because of the vast costs and time necessary to complete the changeover from one whole system to another, the 1974 Louisiana Constitution made its mandatory provisions thereon fully implementable three years after the effective date of the constitution. The constitution became effective on January 1, 1975, and the new assessment system will be completely implemented by January 1, 1978.

The state department of education then decided to take a look at Louisiana's assessment system to see if it would desire to make some educational policy decisions regarding this interim period and to preview and prepare for the new property tax system coming into effect during fiscal year 1978–1979. It is taking those fiscal

agencies charged with implementing the new system some three years and some $18 million dollars to accomplish their task. The state department of education never intended to be that exact in its own look at the system; it authorized some mere $16,000.00 or so to have a simple sales/assessment ratio study done in 1975 using only 1974 sales data.

This sales/assessment ratio study was done in two distinct parts: (1) The state department of education itself, using retired teachers and principals under the supervision of Ed Milligan, a department staff member, went out to the various courthouses to gather the data needed (the prices of sales of immovable property from the 1974 clerk of court conveyance records and the assessed values of those immovable properties sold in 1974 from the tax rolls) and (2) computer computation of the data, according to statistical standards, done by a Michael Peters, Ph.D, a faculty member of Louisiana State University. This particular sales/assessment ratio study has become commonly known as "the Peters' Study," although Dr. Peters himself did not take part in defining or gathering the data nor in using or applying the computations to any property tax figures.

The figures used by plantiff-appellants on page 6 of their jurisdictional statement, wherein they seek to dramatize their contentions to this Honorable Court, are purportedly based upon this sales/assessment ratio study and are unreliable and erroneous. Those figures contain a sales/assessment ratio adjustment for movable property as well as immovable property, but the scope of the study excluded movable property and included only

immovable property. [Dr. Peters himself has said that trying to use the immovable property adjustment figures on movable property values is erroneous and was put on paper by a department staff member after Dr. Peters completed his part of the study and without Dr. Peters' knowledge, and Dr. Peters will so testify in *Horne et al v. Board of Elementary and Secondary Education, et al.*, No. 197,818, Nineteenth Judicial District Court of Louisiana, Parish of East Baton Rouge (filed December 3, 1976, and still pending).] The Board of Elementary and Secondary Education also rejected adjustment figures for movable property values, because no study was ever done on those particular values; the 1976–1977 program formula does contain adjustment figures for immovable property values but not for movable property values. Moreover, Dr. Peters has already testified in a deposition in the *Horne* case, supra, that the so-called statewide average of 11.39% is *not* the statewide average of all assessed value/fair market value ratios of local assessors but rather is an average of the usable data gathered in the study, which is unweighted as to total local volumes of property value but instead depended on a complicated statistical formula involving confidence level, precision, and population deviation.

Furthermore, all the figures adopted by plaintiff-appellants from the Peters' Study are inexact and unreliable. All statisticians agree that this type of study, relatively easy, inexpensive and time-saving to do, *at best* results only in estimated approximations based on random samplings of random samplings. That conclusion is when the data gathered and studied are *at best*; in this

case, not only were movable property values not studied at all but also excluded were all unsold immovable properties, including the most valuable properties of all—industrial property—which is rarely sold outright for fair market value. In many parishes, no commercial properties were studied. Yet, plaintiff-appellants relied upon this study as their only evidence to prove factually their main contention. [While the raw evidence of the study itself was uncontroverted, there was still argument over what it proved or failed to prove. The same is true of a stipulation which agreed that the average ratio of assessed value to fair market value as to only immovable property varied from parish to parish to a degree more than de minimis; the exact degree was left open, movable property left open, and no legal conclusions conceded.] The District Court below rejected this proof summarily, when it said, "This formula would depend on three theoretical figures, *not readily susceptible of being computed*. . . ." (Emphasis added.) 415 F.Supp. at 275.

Evidence was uncontrovertedly admitted to show that the definition of the minimum educational level guaranteed by the state in 1975–1976 was actually being implemented and fulfilled in every local school district in the state by the 1975–1976 program formula, that adjustment of that formula in any other way, including any way urged by plaintiff-appellants, would thwart the fulfillment of that state goal or interest in insuring the minimum foundation program of education in 1975–1976, and that the state department of education monitors the yearly local property tax and other local revenue sources to the effect that such monitoring enables the department of education and the legislature to make adjustments in any year wherein they may see a local assessor attempting purely subjective manipulation of the local school board tax by assessment practices or otherwise.

F. The Question Is Insubstantial

The holding in *Levy v. Parker*, supra, is totally inapplicable to this case on appeal. The majority opinion in *Levy* makes it clear that the holding of that case is unique and is based upon a myriad of variables which happened to come together in a singular way to effect a denial of equal protection. Essential ingredients in *Levy* missing in this case on appeal include the following: (1) A Property Tax Relief (PTR) fund with its peculiar goal or state interest purported to be furthered therein—to wit: to reimburse local governing authorities for tax revenues they would have collected but for the existence of the Louisiana homestead exemption. (2) The limitation on taxes (millages) that electors within certain local tax districts could impose on themselves, and the lack of such limitation on citizens of other local tax districts. (3) The fact that in *Levy* only the assessed value of the homestead exemption was involved—$2,000 (regular) or $5,000 (veteran's)—a fixed value in all the parishes of the state, while it was the millage rate that varied and that caused the disparity in the distribution of the PTR fund (varying millage rate times fixed values of the homestead exemption). (4) The fact that the homestead exemption relates only to immovable property and that the PTR fund related only to immovable property. (5) Most of all, as the District Court emphasized, in *Levy*,

unlike this case on appeal, there was a continuing formula not subject to annual legislative review and appropriation. As the court said in *Levy*,

> "We express no opinion concerning the validity of a legislative plan basing appropriations on standards employing geographic, population, or other systematic classifications. It should be unnecessary to distinguish the inequality arising in this situation from the disparity that might result from annual or biennial legislative appropriations to local areas. Such appropriations are not based on a continuing formula. The legislature perforce reviews its action with each appropriation; further, appropriations generally do not continue in effect from one session to another. Those entities receiving less can make a special legislative appeal, and they are afforded access to the legislative process every session to seek change." 346 F. Supp. at 904.

Moreover, the denial of equal protection in *Levy*—though it incidentally resulted in a parish to parish variance—really lay in the unequal treatment of only those truly similarly situated, that is, those owning homes of like value, within the same neighborhoods, within the same parish, having the same governmental needs and sharing the same tax burden. The PTR Fund paying state revenues only for taxes lost by the homestead exemption, induced local assessors to assess, for example, one of these similarly situated homes, having no homestead exemption, at $500.00, to assess a second of these similarly situated homes, having a $2,000.00 regular homestead exemption, at $2,500.00 and to assess a third of these similarly situated homes, having a $5,000.00 veteran's homestead exemption, at $5,500.00.

[The homestead exemption itself did not relate to local tax burdens or home values but rather to the status of their owners.] This overall situation was pointed out by the majority opinion in *Levy*,

> "It was possible to increase the parish share of PTR Fund payments, without simultaneously increasing the tax burden on local homeowners, by raising the millage rate on all property while lowering the assessments on property not occupied as a homestead and raising the assessments of homesteads to approach the allowable homestead exemption. The evidence indicates that this was in fact done." 346 F. Supp. at 903.

While the state goal or interest sought to be furthered in *Levy* under the PTR Fund was to reimburse to local governing authorities revenues lost because of the homestead exemptions, the state goal or interest rationally furthered in this case on appeal is to have the state annually insure, as a secondary obligor, a yearly minimum foundation program of education, without establishing a maximum, in each local school district of the state to the extent that local ability to pay therefore falls short of fully supporting the program therein. This goal is met by an annual formula and an annual appropriation of the legislature. Both the goal and the means, in this case on appeal, are wholly unconnected to the goal and the means described in *Levy*. Moreover, two of the three judges in *Levy* and on the District Court below herein were the same. Judge Alvin B. Rubin, the author of the majority opinion in *Levy* at trial, saw the distinctions herein and fully concurred in the Per Curiam opinion of the District Court below.

In their jurisdictional statement, plaintiff-appellants assert that the District Court below fundamentally misinterpreted *San Antonio Independent School District v. Rodriquez*, 411 U. S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) in the following respects: They claim that *Rodriquez* was limited only to the question of variances in property tax from district to district as to total property value disparities and was also limited to the question of allocating state resources in such a manner as not to be invidiously discriminatory. Defendant-appellees and Louisiana School Boards Association submit that it is plaintiff-appellants, not the District Court below, who are fundamentally misinterpreting the *Rodriquez* case.

As the majority opinion in *Rodriquez* pointed out,

> "In part, local differences are attributable to differences in the rates of taxation or in the degree to which the market value for any category of property varies from its assessed value. The greatest interdistrict disparities, however, are attributable to differences in the amount of assessable property available within any district.
>
> * * * *
>
> The District Court found that the State had failed even 'to establish a reasonable basis' for a system that results in different levels of per-pupil expenditure. 337 F. Supp., at 284. We disagree." 411 U. S. at 46–47 93 S.Ct. at 1303–1304.

In *Rodriquez*, then, the disparities at the local level in the property tax, even purely in the Local Fund Assignment, were due to differences among the districts as to all three factors—(1) millage rates, (2) ratios of assessed values to fair market values, and (3) total property values. In Louisiana's 1975–1976 program formula, local support contribution possibly varied somewhat because of differences in ratios of assessed values to fair market values, but mostly they varied because of the vast differences in total property values existing among the various parishes.

It is true that in Louisiana the local school boards are co-extensive with the parishes, except that two cities have their own school boards, and that in Texas the division is first down to county level and then down to several local school districts within each county. But that does not mean that in Texas each local school district within a county has the exact same overall ratio of assessed value to fair market value: One local school district may have a higher mix of industrial and commercial property and a lower amount of residential property than another school district within the same county and consequently has an overall higher assessed value ratio. Furthermore, nothing in the *Rodriquez* opinion indicated that Texas assessors were unlike most assessors and reassessed all property at exactly uniform intervals. If they did not, even with a uniform rate of assessment at the time of each assessment, the difference in intervals between reassessments will cause differences in the ratios of assessed value to fair market value, especially in an inflationary economy. Moreover, a local school district in Texas in one county will have a different assessed value ratio from another local school district in a different county. And while in Texas the Local Fund Assignment was divided at different stages by a compli-

cated economic index, when it came down finally to the last level of actually funding the Local Fund Assignment, it was done among the local school districts by local property taxes having different millages, different assessed values, and different total property values. The District Court below thoroughly agreed with the majority opinion in *Rodriquez*, when it indicated that the variances due to assessment ratio differences, both in Louisiana and in Texas, were insignificant in the face of the vast differences in the total amounts of property values among the various local school districts. The District Court below explained,

> "Even if all property were assessed on a uniform basis, the parishes with relatively less valuable immovable property would contribute less to the MFP than the parishes whose residents own more valuable property." 415 F. Supp. at 275

In spite of the fact that total property value differences would remain, what plaintiff-appellants primarily desire herein is to have this Honorable Court re-legislate the minimum foundation program formula to compel the state legislature, during the interim period in which the new property tax system is being implemented, to use, in determining local ability to support an educational program, the inexact, estimated approximations of differences in assessed value ratios of the "Peter's Study," which approximations are hypothetical, theoretical figures not representing the real, actual amounts of local taxes available to support the educational program. But the District Court below grasped the effect of such use of hypothetical figures and held,

> "The amount a parish actually receives from a 5-mill levy on its actual assessment is a real figure, not a hypothetical one, and it takes parochial ability to pay into account in a way that is different, but not constitutionally invalid." 415 F. Supp. at 275.

Furthermore, the District Court below correctly found, as a matter of fact, that the legitimate state interests or goal in insuring a minimum foundation program of education was actually being fulfilled by the program formula assailed by plaintiff-appellants herein.

> "There is no evidence in the record to suggest that the plan employed discriminates in any way against any definable category of 'poor people' or that it results in the deprivation of a 'minimum foundation education' to any class of persons, or indeed to any individual person. It is clear from the record that the objective of the State's 'Minimum Foundation Program' is being accomplished by use of the formula." 415 F. Supp. at 275.

The evidence uncontrovertedly showed that if any redistribution of the formula occurred, including especially any redistribution implicitly suggested in the remedies urged by plaintiff-appellants, some local school boards would obtain more program support from all sources and some local school boards would receive substantially less and would not be able to offer to their students the minimum level of educational opportunity guaranteed by the state. In other words, what plaintiff-appellants are asking for in this case on appeal is an overshare of minimum foundation program of education funds for themselves at the expense of many other school boards and at the expense of destroying entirely

the state goal or interest sought by the program. In sum, they are asking this Honorable Court to violate the jurisprudential principles of the equal protection clause of the Fourteenth Amendment to the U. S. Constitution, in the name of that clause.

Finally, this case should be summarily affirmed because of the state's intense educational policy and interest at stake herein. As the majority in *Rodriquez* explained,

> "Thus, we stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.
>
> "In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable

> economic, social and even philosophical problems.' Dandridge v. Williams, 397 U. S., at 487, 90 S.Ct. at 1163. The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect. *Jefferson v. Hackney*, 406 U. S., at 546-547, 92 S.Ct., at 1731. On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching reexamination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." 411 U. S., at 41–43, 93 S.Ct., at 1301–1302.

Thus, the holding in *Rodriquez* followed the holding in *McInnis v. Ogilvie*, 394 U. S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969) affirming *McInnis v. Shapiro*, 293 F. Supp. 327 (Ill., 1968), in which the court held,

> "But the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court.
>
> * * * *
>
> "Even if the Fourteenth Amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be non-justiciable. While the complaint does not present a 'political question' in the traditional sense of the term, there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.
>
> "The only possible standard is the rigid assumption that each pupil must receive the same dollar expenditures. Expenses are not, however, the exclusive yardstick of a child's educational needs. Deprived pupils need more aid than fortunate ones. Moreover, a dollar spent in a small district may provide less education than one used in a large district. As stated above, costs vary substantially throughout the state. The desirability of a certain degree of local experimentation and local autonomy in education also indicates the impracticability of a single, simple formula. Effective, efficient administration necessitates decentralization so that local personnel, familiar with the immediate needs, can administer the school system. As new teaching methods are devised and as urban growth demands changed patterns of instruction, the only realistic way the state

> can adjust is through legislative study, discussion and continuing revision of the controlling statutes. Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning. As early as 1919 Mr. Justice Homes explained that 'the Fourteenth Amendment is not a pedagogical requirement of the impracticable.' *Dominion Hotel v. Arizona*, 249 U. S. 265, 268, 39 S.Ct. 273, 274, 63 L.Ed. 597 (1919)." 293 F. Supp. at 332, 335–336.

Burruss v. Wilkerson, 397 U. S. 44, 90 S.Ct. 812, 25 L.Ed.2d 37 (1970) affirming *Burruss v. Wilkerson*, 310 F. Supp. 572 (Va., 1969) is in accord.

For all of the above and foregoing reasons the judgment of the District Court below should be summarily affirmed. To do so would save this Honorable Court needless time, energy, and expense merely to reannounce principles which it has already exhaustively explained and firmly entrenched in preceding cases. The invaluable time of this Honorable Court and the invaluable and limited capacity of its docket could, in this way, be reserved for that other class of extremely significant and pressing cases raising novel issues resolutions of which will affect broad policies relating to the individual and his government on a nationwide scale.

II. MOTION TO DISMISS

In the alternative to Louisiana School Boards Association's and defendant-appellees' motion to affirm the summary judgment of the District Court below, defendant-appellees and Louisiana School Boards As-

sociation move this Honorable Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss this appeal on the grounds that this appeal presents an insubstantial federal question, that the case is now moot and is no longer a "case or controversy," that plaintiff-appellants, by this appeal, are in essence seeking only an advisory opinion of this Honorable Court, that the existence of other state grounds on which the case may be decided to avoid unnecessary constitutional decisions and the novelty of those state issues give rise to the doctrine of abstention for reasons of federal comity, and that if the District Court below had not granted defendant-appellees' motion for summary judgment, the District Court below should then have dismissed Orleans Parish School Board as a party plaintiff and declined to accept jurisdiction over this subject matter.

A. Insubstantial Federal Question

Defendant-appellees and Louisiana School Boards Association submit that the question presented on this appeal is an insubstantial federal question for all the same reasons expressed therefor in their foregoing motion to affirm.

B. Mootness and Lack of Controversy

In view of the facts that the distribution of all minimum foundation program of education funds under the 1975–1976 formula, sought to be enjoined, after a declaratory judgment that that particular formula violated the U. S. Constitution, by plaintiff-appellants herein,

has been completed and that the 1975–1976 program formula complained of has now expired forever as of June 30, 1976, defendant-appellees and Louisiana School Boards Association submit that this case is now moot. The tardiness of plaintiff-appellants' complaint is underscored by the fact that variations in assessment ratios, the very heart of the attack on the 1975–1976 formula, were adjusted for in the 1976–1977 program formula. Moreover, the new state property tax assessment features are due to be completed by January 1, 1978. There is no longer any "case or controversy" with respect to the expired 1975–1976 formula nor with respect to any future formulas which might speculatively be the same as the 1975–1976 formula. As pointed out in the motion to affirm, the program formula changes annually and, as shown in the District Court below, is part of an evolving process. The past formula attacked is gone, and there is in existence now no formula which falls within the ambit of plaintiff-appellants' complaint. Therefore, this case on appeal is now moot and presents no "case or controversy" to this Honorable Court. The fact that sometime in the future a formula may or may not be devised which falls within the ambit of plaintiff-appellants' complaint is purely speculative; until there is one, there is no exigent controversy within the scope of plaintiff-appellants' complaint.

As the court succinctly explained in *Mills v. Green*, 159 U. S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895),

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not

to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." 16 S.Ct. at 133.

C. The Seeking of an Advisory Opinion

For the same reasons given above in support of mootness and lack of controversy, it is clear that plaintiff-appellants, by this appeal, are really only seeking an advisory opinion of this Honorable Court. As noted in their jurisdictional statement and in Louisiana School Boards Association's and defendant-appellants' motion to affirm, the case of *Horne et al v. Board of Elementary and Secondary Education et al.*, No. 197,818, Nineteenth Judicial District Court of Louisiana, is now pending in state court, wherein the 1976–1977 minimum foundation program of education is under attack concerning the assessment variance adjustments and the "Peter's Study." Defendants in this case on appeal are defendants in the *Horne* case also. The Louisiana School Boards Association, the Jefferson Parish School Board, and Orleans Parish School Board are all parties in this case on appeal and in the *Horne* case also. What plaintiff-appellants appear to be seeking by this appeal is an advisory opinion by this nigh Honorable Court, in order to resolve indirectly the *Horne* case. Certainly, if plaintiff-appellants were granted their contentions on this appeal, the *Horne* case would be indirectly resolved thereby. Defendant-appellees and Louisiana School Boards Association suggest that this Honorable Court not take this appeal but rather wait for the appeal of the *Horne* case, which, unlike this case on appeal now, does present a case and controversy at this time.

D. Abstention

The District Court below, after finding no federal constitutional violation, dismissed the pendant claim under the Louisiana Constitution asserted in the alternative by plaintiff-appellants in support of the same relief. The District Court below cited *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Defendant-appellees and Louisiana School Boards Association believe that this was a wise decision, especially since there has been no state court interpretation of the brand new state constitutional provisions asserted in the pendant claim.

Now, however, defendant-appellees and Louisiana School Boards Association further suggest that before this Honorable Court take up the federal constitutional issues on this appeal, it abstain from doing so, in order to avoid unnecessary constitutional decisions, and allow these issues to be resolved first in state court on the alternative state grounds raised by plaintiff-appellants in the court below. This suggestion is especially apropos in view of the fact that at the present time there already is a pending state case on this subject matter, *Horne et al v. Board of Elementary and Secondary Education et al.*, supra.

E. Dismissal of Orleans Parish School Board and Lack of Jurisdiction Over the Subject Matter

In the District Court below defendant-appellees

filed a motion for summary judgment which was granted. In the alternative thereto, a motion to dismiss Orleans Parish School Board as a real party plaintiff in interest and to dismiss the action as to all other plaintiffs for lack of jurisdiction over the subject matter was also filed. Defendant-appellees and Louisiana School Boards Association now submit that before this Honorable Court attempt to overturn the granting of the motion for summary judgment below, it dismiss this case on the grounds that Orleans Parish School Board is not a proper party plaintiff and that there is no jurisdiction over the subject matter of the claims of all other plaintiff-appellants.

Orleans Parish School Board is not a real party plaintiff in interest herein, because it is a mere political subdivision of the state of Louisiana and, as such, possesses no equal protection rights against the state. It is a political subdivision. Article VI, Section 44, Paragraph (2), of the 1974 Louisiana Constitution, states,

> "(2) 'Political subdivision' means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions."

It has no power to sue in federal court in a representative capacity. No Louisiana Supreme Court opinion has said so, and the state statutes grant it power to sue only in its own right. It has no equal protection rights itself against the state. *Triplett v. Tiemann*, 302 F. Supp. 1239 (Neb., 1969). In accord are *County of Lancaster v. Philadelphia Electric Co.*, 386 F. Supp. 934 (Penna.,

1975); *City of Trenton v. New Jersey*, 262 U. S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *City of Newark v. New Jersey*, 262 U. S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); *Williams v. Mayor and City Council of Baltimore*, 289 U. S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); and annotation, 116 A.L.R. 1037.

Once Orleans Parish School Board is dismissed as a party plaintiff, there is a lack of jurisdiction as to the claims of all other plaintiffs. 28 U.S.C. §1343 jurisdiction is improperly invoked in a case of this type and is inapplicable hereto, and jurisdictional amount was never met factually in good faith under 28 U.S.C. §1331 with respect to the claims of the six individual Orleans Parish taxpayers remaining as sole plaintiffs herein.

Jurisdiction under 28 U.S.C. §1343 is improperly invoked herein and is inapplicable hereto. There is no federal constitutional right to education. The majority in *Rodriquez* held,

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U. S. at 35, 93 S.Ct. at 1297.

And,

> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." 411 U.S. at 33, 93 S.Ct. at 1297.

Jurisdiction was properly exercised in the *Rodriquez* case itself because at that time many believed in good

faith that there was a federal constitutional right to education, but now that *Rodriquez* has clarified it otherwise, 28 U.S.C. §1343 jurisdiction is not applicable to this kind of case.

Because there is no federal constitutional right to education, the only interest the six individual plaintiffs can claim is their equal treatment in the collecting and disposition of taxes. In short, their claim is limited to a taxpayers' action. What they claim expressly in their complaint is unequal treatment in taxpaying ability; that is the personal legal interest upon which their cause of action is based.

Such being the case, there is lack of jurisdiction as to jurisdictional amount under 28 U.S.C. §1331 as interpreted by *Alterman Transport Lines, Inc. v. Public Service Commission of Tennessee*, 386 U. S. 262, 87 S.Ct. 1023, 10 L.Ed.2d 39 (1967) affirming 259 F. Supp. 486 (Tenn., 1966), rehearing denied 386 U. S. 1014, 87 S.Ct. 1343, 18 L.Ed.2d 452 (1967); *Buckingham v. Lord*, 326 F. Supp. 218 (Mont., 1971); and *Carter v. County Board of Education of Richmond County, Georgia*, 393 F.2d 487 (5th Cir., 1968).

It is true that in *Lynch v. Household Finance Corporation*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) this Honorable Court rejected the jurisdictional distinction between "personal" and "proprietary" rights. However, that case involved deprivation of property without any procedural due process under a state's prejudgment garnishment statute. And in that case, where the court rejected the distinction, the court dropped

footnote 6 at 405 U. S. 542, 92 S.Ct. 1117. That footnote said, in pertinent part,

" * * * * *

> "We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. [Citing cases.] * * *The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with long-standing judicial policy." Note 6, 405 U. S. at 542, 92 S.Ct. at 1117.

It must be emphasized that the intent of that quote was to describe a special class of taxpayers' cases broader in scope than the express provisions of 28 U.S.C. §1341 and dismissable not on the grounds of 28 U.S.C. §1341 itself but rather on the grounds of non-applicability of 28 U.S.C. §1343 and lack of jurisdictional amount under 28 U.S.C. §1331. This class of cases, though not strictly 28 U.S.C. §1341 type of cases, are thus dismissable as being *consistent with* 28 U.S.C. §1341.

For all of the above and foregoing reasons, this Honorable Court, before it should attempt to note probable jurisdiction, ought to dismiss this appeal.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I CERTIFY that, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, three copies of the foregoing Motion to Affirm or Dismiss have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto, this_____day of March, 1977.

THOMAS S. HALLIGAN

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